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ADMINISTRATIVE LAW SECTION of AMERICAN BAR ASSOCIATION

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PROGRAM OF ADMINISTRATIVE LAW SECTION AT CONVENTION IN WASHINGTON, D. C.

Chairman, Ashley Sellers, Washington, D. C., Presiding at all Sessions.

Monday, Sept. 18, 1950

2:00 P. M. (Room 259, Mayflower Hotel)
Meeting of Council

Tuesday, Sept. 19, 1950

10:00 A. M. (East Room, Mayflower Hotel)
Meeting of Section:
Reports and Recommendations by Chairmen of Committees:
State Administrative Law, Charles B. Nutting, Pittsburgh, Pennsylvania
Publications, Carl McFarland, Washington, D. C.
Membership, Ward M. French, Washington, D. C.
Organization and By-Laws, Miss Louisa Wilson, Washington, D. C.
Remarks on the Pending Administrative Practitioners Act, by Honorable Francis E. Walter, United States Representative from Pennsylvania; Aaron Ford, Washington, D. C.; and John D. Randall, Cedar Rapids, Iowa

12:30 P. .M. (Ball Room, Mayflower Hotel)
Joint Luncheon with Administrative Law Groups of Federal and District of Columbia Bar Associations
Presiding:
Ashley Sellers, Washington, D. C., Chairman of Section
Nathaniel J. Ely, Washington, D. C., Chairman of Section of Administrative Law, Bar Association of the District of Columbia
Thomas J. Flavin, Washington, D. C., Chairman of Division of Administrative Law, Federal Bar Association
Presentation of Awards in Essay Contest on State Administrative Law
Speaker: Honorable Gordon E. Dean, Chairman of Atomic Energy Commission

2:15 P. M. (East Room, Mayflower Hotel)
Meeting of Section:
Reports and Recommendations by Chairmen of Committees:
National Committee, Clarence A. Miller, Washington, D. C.
Administrative Court Proposal, Robert M. Benjamin, New York City

Administrative Practitioners, Aaron L. Ford, Washington, D. C.

Administrative Procedure Act, Robert H. Young, Philadelphia, Pennsylvania

Administrative Rules and Rule-Making, Ralph F. Fuchs, Bloomington, Indiana

Administrative Salaries, Robert Elliott Freer, Washington, D. C.

Executive Reorganization, David Reich, Washington, D. C.

Selection and Qualification of Examiners and Personnel, Ralph N. Kleps, Sacramento, California

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Unfinished Business
New Business
Report of Nominating Committee
Election of Officers
Adjournment

REPORT OF THE NATIONAL COMMITTEE

[Editorial note: In a comprehensive report, the National Committee has recommended:

1. That the Section approve, in part, S. 3076, which, the Committee reports, is evidently designed to change the law as announced by the United States Supreme Court in the second *Chenery* case, 332 U. S. 194.

2. That H. R. 7301, designed to amend Section 10 (d) of the Administrative Procedure Act to grant further interim relief be discussed at the Section meeting so that the Section may determine its position in this matter.

3. That the Section oppose S. 1982, which deals with the position of the Post Office Department under the Administrative Procedure Act.

4. That the Section oppose H. R. 10, which, among other things, provides that some provisions of the Administrative Procedure Act shall be inapplicable to certain proceedings respecting aliens.

5. That the Section take no action with respect to S. 1973, which relates primarily to the Federal Communications Act of 1934, as amended.

6. That the Section take no action respecting H. R. 5487 and H. R. 5488, both of which relate to methods of judicial review of actions of specified agencies.

7. That the Section not approve S. 14, which is designed to eliminate overlapping of certain administrative agencies (the Committee recommends that the Section appoint a special committee to study the problem raised by the bill).

8. That, in connection with S. 3455, which revises the law relating to immigration, naturalization, and nationality, the Section reaffirm its opposition to exemption of deportation of alien proceedings from the requirements of the Administrative Procedure Act.

9. That the Section affirmatively endorse H. R. 8201, which has for its purpose the protection of the public with respect to practitioners before administrative agencies.

Following are verbatim excerpts from the Report of the National Committee.]

Opening

The National Committee consists of the Chairman, the Vice-Chairman, the chairmen of the several committees reporting to the National Committee, and three additional members selected by the Chairman of the Section for their special qualifications. There are, therefore, twenty-two members of the Committee. Because of the great distances some of the members would have to travel, it has not been possible to have formal meetings of the entire Committee. However, from time to time, the available members of the Committee have met for a

discussion of certain subjects. The Committee has had the benefit of the advice and cooperation of the Chairman of the Section, who has, at all times, been kept fully informed of the activities of the Committee.

The report of the Committee reflects, at least in great measure, the work of the various subordinate committees, which has been supervised and coordinated to the extent that circumstances would permit.

Delegation of Authority

At its Mid-Winter meeting the House of Delegates directed that the Section of Administrative Law, as the successor of the prior Special Committee on Administrative Law, by all necessary and proper means, including appearances before legislative committees, (1) preserve the gains made by the adoption of the Administrative Procedure Act as the law of the land, (2) develop and seek the adoption of improvements thereof as well as additional measures to like purposes, and (3) procure the assistance of officers, units, and members of this Association as well as the cooperation of those of State and local bar associations.

With the concurrence of the Council of the Section, the National Committee was requested by the Chairman of the Section to assume responsibility for appearance before Congressional committees, on behalf of The American Bar Association, respecting amendments to the Administrative Procedure Act.

The Chairman of the National Committee was authorized by the Chairman of the Section to determine, from time to time, whether the preparation and presentation of the Association's position should be undertaken by him or by another member of the Committee.

This delegation of authority gave to the National Committee and to its Chairman, an important assignment, and one that necessitated the exercise of extreme caution. Up to the time this report was prepared, the authority was exercised and duly performed in only one instance.

[Editorial Note: The instance referred to was in connection with the President's Re-Organization Plans discussed below in these excerpts from the Report of the National Committee.]

Administrative Procedure Act

The Administrative Procedure Act became a law very largely by reason of the efforts of The American Bar Association, and particularly its Special Committee on Administrative Law which was the predecessor of the Section of Administrative Law. That law faced its first real judicial test in *Wong Yang Sung* v. *McGrath, Attorney General, Et Al.*, which was decided by the Supreme Court of the United States on February 20, 1950. [339 U. S. 33] The Court sustained the law against all the attacks made on it, taking a broad view of its coverage. The opinion of the Court was reproduced in full in the Administrative Law Bulletin (Vol. 2, No. 3) of February 27, 1950. The Court said that Congress had concluded that the price for greater fairness in administrative hearings was not too high, and the Administrative Procedure Act could not be over-ridden by the mere statutory authority of subordinate administrative officers. A number of the administrative agencies of the Government do not like the provisions of the Administrative Procedure Act, and some of the agencies have asked for express leg-

islative exemptions. These requests have been carefully watched, and appropriate action has been taken to oppose them if and when they receive the consideration of the committees of the Congress.

President's Reorganization Plans

On March 13, 1950 the President submitted twenty-one Reorganization Plans to Congress, to become effective at midnight on May 23 unless rejected by a constitutional majority of either House of Congress.

Reorganization Plan No. 7 related to the Interstate Commerce Commission. Reorganization Plan No. 8 related to the Federal Trade Commission. Reorganization Plan No. 9 related to the Federal Power Commission. Reorganization Plan No. 11 related to the Federal Communications Commission. Because of the peculiar language used in these reorganization plans as submitted to the Congress, they were susceptible to the construction that Section 11 of the Administrative Procedure Act would be inapplicable to these agencies if the reorganization plans were permitted to go into effect. For this reason, and this reason alone, these reorganization plans were opposed by The American Bar Association, acting through the Section of Administrative Law, the testimony being presented by the Chairman of the Committee. Reorganization Plan No. 7 was rejected by the Senate on May 17 by a vote of 66 to 13. Reorganization Plan No. 11 was rejected by the Senate on the same day by a vote of 50 to 23. Reorganization Plans 8 and 9 were permitted to become effective.

Pending Legislation

The Administrative Procedure Act Committee was assigned the task of reviewing pending Federal legislation designed to amend or otherwise affect the Administrative Procedure Act. That committee considered eight pending bills, each of which is here summarized, together with the conclusions which have been reached.

Other bills relating to the Administrative Procedure Act are also included in this report.

S. 3076

This bill was introduced by Senator Johnson of Colorado and amends Section 9, subsection (a) and Section 10, subsection (e) of the Administrative Procedure Act. Section 9(a) as amended would read as follows:

> "Section 9. In the exercise of any power or authority—'(a) In General.—*Standards of conduct and other requirements shall be prescribed prospectively and shall not be applied retroactively.* No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency, *and within authority expressly or impliedly conferred by law upon* the agency.' "

Section 10(e) is amended by adding a new sentence at the end thereof as follows:

> "Statutory provisions shall not be interpreted as authorizing Agency action, findings or conclusions which are merely consistent with or not contrary to such provisions."

The proposed amendments are apparently designed to cope with the problem raised by the recent decision of the Supreme Court in the second *Chenery* case 332 U. S. 194.

Until that decision the rule of law with respect to delegation of legislative power to administrative agencies was governed by the principle expressed in the first *Chenery* case 317 U. S. 80, 92 (1942).

> ". . . But before transactions otherwise legal can be outlawed or denied their

usual business consequences, they must fall under the ban of some standards of conduct prescribed by an agency of government authorized to prescribe such standards—either the courts or Congress or an agency to which Congress has delegated its authority."

The second *Chenery* case wiped out this previous rule by holding, in effect, that an administrative agency's action did not require the sanction of any law, judicial precedent, rule or regulation; the action being sustainable so long as it was merely consistent with or not contrary to the statutes under which the agency operates. As noted by Justice Jackson in his dissenting opinion to the second *Chenery* case, this conclusion "makes judicial review of administrative orders a hopeless formality for the litigant even where granted to him by Congress."

Although the case was a four to three decision, it appears to have been re-affirmed and perhaps broadened in the *Engineers'* case 338 U. S. 96 (1949).

In the light of this new precedent the Committee feels that the proposed amendment is necessary remedial legislation, in order that the Administrative Procedure Act, with its provisions for appeal and review, can be given the effect which Congress intended it to have. However, the Committee believes that the phrase "within authority expressly or impliedly conferred by law" is less restrictive than the present wording of Section 9(a) which reads "as authorized by law." Moreover, the new language might provide a further loophole in the interpretation of Section 10(e).

[Editorial note: The Committee recommends that the Section adopt a resolution approving S. 3076, as modified by elimination of the second of the proposed changes to Section 9(a) of the Administrative Procedure Act.]

H. R. 7301

Section 10(d) of the Administrative Procedure Act authorizes reviewing courts to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings to the extent necessary to prevent irreparable injury. H. R. 7301 amends this provision by adding to the end thereof the following words:

"(whether or not review proceedings have begun); in the case of agency action which is not final, a court which would have jurisdiction to review such action if it were final shall be considered a reviewing court for the purposes of this sentence."

The purpose of this amendment is apparently to clarify the situations in which interim relief pending judicial review may be granted. Since the right is limited to cases where such action is necessary to prevent irreparable injury, and the courts are given the right to impose conditions, there would appear to be adequate safeguards against any abuse of the authority which is added by this amendment. The Committee can see no objection to the amendment, although no imperative necessity for it has been brought to the Committee's attention.

[Editorial note: The Committee recommends that the Section discuss H. R. 7301 at its annual meeting and decide whether formal action by the Section should be taken.]

S. 1982

This bill is designed to make the Administrative Procedure Act applicable to certain hearings of the Post Office Department. It provides that in administering the provisions of Section 3929 and 4041 of the

Revised Statutes (39 U. S. C. A. 259, 732) the Postmaster General shall, to the maximum extent determined by him to be consistent with the effectuation of the purposes of such sections, accord each affected addressee or payee an opportunity to have the charges against him adjudicated upon the record after an agency hearing. The bill further provides that Sections 5, 7 and 8 of the Administrative Procedure Act shall be applicable in every case in which such opportunity for adjudication is so accorded.

The bill refers primarily to so-called fraud orders of the Post Office Department. The Department's current practice and procedure in these cases is reasonably close to that called for by Sections 5, 7 and 8 of the Administrative Procedure Act.

However, there is no provision for compliance with the third sentence and the last clause of the second sentence of Section 5(c) dealing with separation of functions; no provision is made for exceptions to recommended decisions; and the examiner is not required to state reasons for his recommendations. Other differences include: the inability of Trial Examiners to issue subpoenas or to take or cause depositions to be taken; the lack of a provision for providing respondent with a copy of the transcript; the lack of a provision for submitting proposed findings and conclusions; and a general lack of conformity with Section 11 of the Procedure Act dealing with trial examiners.

The bill as written appears to be a rather devious attempt to avoid the provisions of the Administrative Procedure Act. Although Sections 259 and 732 do not, in express terms, require a hearing, the courts have frequently held that such a requirement is the proper interpretation of those sections. In the light of this fact it seems quite likely that the courts may hold such proceedings to be subject to the Administrative Procedure Act under its present terms. Several lower court decisions are to the contrary, (*Research Laboratories* v. *Donaldson,* D. C. for Dist. of Columbia 7/28/48, and *Roley Sales Company* v. *Goldman,* D. C. for So. Dist. of New York 10/18/48) but the recent decision by the U. S. Supreme Court in *Wong Yang Sung* v. *McGrath et al.,* decided February 20, 1950 [339 U. S. 33] may well provide the necessary precedent. In any event, the Committee can see no justification for the qualifying phrase:

> "To the maximum extent determined by him to be consistent with the effectuation of the purpose of such sections"

nor can it see any basis for not including Section 11 of the Administrative Procedure Act in the list of Sections to be applicable. The phrase: "the maximum extent, etc." would provide an opening wedge for general avoidance of the Administrative Procedure Act by other agencies and Section 11 should be included in order to secure the separation of functions not now found in these postal proceedings.

[Editorial note: The Committee recommends that the Section oppose S. 1982 in its present form.]

H. R. 10

This bill was introduced by Congressman Hobbs and is designed to facilitate the deportation of aliens from the United States, to provide for supervision and detention pending eventual deportation of aliens whose deportation cannot be readily effectuated because of reasons beyond the control of the United States and for other purposes.

The only provision of the bill of concern to this Committee is that providing that none of the provisions of Sections 5, 7, 8 and 10 of the Administrative Procedure Act shall be applicable to the provisions of any law relating to immigration, exclusion, expulsion and registration of aliens or to the nationality or naturalization laws of the United States.

This bill represents a second attempt to remove immigration proceedings of all kinds from the control of the Administrative Procedure Act and the recent Supreme Court decision in *Wong Yang Sung* v. *McGrath,* 94 L. Ed. 383 (1949) [339 U. S. 33] has prompted this renewed effort. The Administrative Law Section registered its opposition to the proposal when a similar bill failed to pass the 80th Congress. This opposition by the Section was recognized in the minority report of the Judiciary Committee on H. R. 10.

[Editorial note: The Committee recommends that the Section oppose H. R. 10.]

S. 1973

This bill was introduced as a further amendment to the Communications Act of 1934, as amended, was unanimously passed by the Senate on August 9, 1949, and is now pending before the House Committee on Interstate and Foreign Commerce.

The principal provisions of the bill have to do with specialized matters of particular interest to the Communications Bar and only four sections deal directly with the Administrative Procedure Act. Section 14 provides for the issuance of declaratory orders along lines similar to those set forth in the Administrative Procedure Act, but it goes further by providing that such orders shall be issued only upon petition and after notice and opportunity for hearing and such orders shall be subject to judicial review. Section 15 deals with judicial review and provides for interim relief in language substantially similar to that of the Administrative Procedure Act. The provisions for interim relief are somewhat stronger than those set forth in Section 10(d) of the Administrative Procedure Act in that they confirm this authority by specific language rather than by inference. Section 17 amends directly three additional provisions of the Administrative Procedure Act. Subsection (a) provides that no hearing shall be held by a single commissioner. Sub-section (b) expands on Section 8 of the Administrative Procedure Act dealing with the procedure in conducting hearings and the material to be included in the record. Subsection (c) places certain additional requirements on the conduct of hearing officers and other employees, both during the hearing and subsequent thereto, but before final decision. Its aim is apparently to clarify the separation of prosecutory and judicial functions. In so doing it does not change the Administrative Procedure Act but adds to it. Section 18 provides that except as specifically provided in the Act, provisions of the Administrative Procedure Act would apply in all proceedings of the Act.

An examination of these pertinent provisions indicates that they in no way violate the provisions of the Administrative Procedure Act. Rather they appear to accept the precedent set by the Act and to expand it further for purposes of greater clarity or additional safeguard. As a consequence this Committee has no objection to the Act based on its function as a watch dog of the Administrative Procedure Act. The sole

question raised is whether it is desirable to permit the procedure of individual agencies to be changed in this fashion rather than through amendments to the Procedure Act itself.

The Committee believes that the primary purpose of the Procedure Act was to establish a uniform minimum standard, but not to prevent individual agencies being subject to additional standards. Consequently the Committee has no objection to this bill. To the extent that the changes proposed are supplemental in nature they should certainly not be opposed by this Section. To the extent that the bill actually alters existing language of the Procedure Act, it is felt that those changes should be studied further to determine whether they could be properly applied to all agencies. The Communications and other similar groups should not be held up pending such study, however.

[Editorial note: The Committee states that it does not feel that any action by the Section with respect to S. 1973 is now required.]

H. R. 5487 and H. R. 5488

Both of these bills were introduced by Mr. Hobbs in July of 1949. Their objectives are substantially similar and though it is understood that no action will be taken on these bills by the 81st Congress they have been considered by the Committee.

H. R. 5487 provides that the Court of Appeals shall have exclusive jurisdiction to enjoin, set aside, suspend in whole or in part or to determine the validity of all final orders (a) of the Federal Communications Commission made under the Communications Act of 1934, as amended, and (b) of the Secretary of Agriculture under the Packers and Stockyards Act of 1921, as amended, and under the Perishable Agriculture Commodities Act of 1930, as amended, except orders issued under Sections 309(e) and 317 of the Packers and Stockyards Act and Section 7(a) of the Perishable Agriculture Commodities Act and, (c) such final orders of the United States Maritime Commission entered under authority of the Shipping Act of 1916, as amended, and the Intercoastal Shipping Act of 1933, as amended, as are now subject to judicial review pursuant to the provisions of Section 31 of the Shipping Act of 1916, as amended. *H. R. 5488* provides for similar jurisdiction of the Court of Appeals in cases of final orders of the Interstate Commerce Commission entered under certain named provisions of the Interstate Commerce Act.

The main purpose of both bills is to provide for a uniform method of review of the orders named and to get away from the present procedure under which certain orders of the same agency are reviewed by three-judge courts and others by the Court of Appeals. Each bill contains certain provisions regarding the stay or suspension of orders pending review. H. R. 5487 contains an additional provision providing for procedure in cases where no hearing has been held. The Section requires the Court of Appeals to determine whether a hearing is required by law. Where it finds that a hearing is required, proceedings are remanded to the agency for that purpose, and where it finds that a hearing is not required, the Court of Appeals will pass on the issues if there is no genuine issue of material fact or transfer the proceedings to United States District Court if there is a genuine issue of material fact.

With the exception of this last mentioned provision both bills appear to be directed

primarily along jurisdictional lines and do not purport to deal with matters within the scope of the Administrative Procedure Act. Section 10(d) of the Administrative Procedure Act does, of course, provide for interim relief and, therefore, would seem to make unnecessary the provisions of this bill dealing with that subject. Similarly, Section 7(d) of H. R. 5487 contains provisions regarding the scope of review which appear to merely express, though without equal clarity, the provisions of the Administrative Procedure Act on that subject.

The provisions of neither bill would seriously affect the Administrative Procedure Act insofar as the determination of what constitutes "final orders" is concerned. It would appear from the language that only such final orders of these agencies as are now subject to judicial review would be reviewable under these bills. Certainly without some more specific reference to the Administrative Procedure Act, the bills could not be held to amend the Procedure Act definition of what is a final order.

The provisions of Section 7(b) of H. R. 5487 dealing with the procedure where no hearing has been held do not appear to violate any existing requirement of the Administrative Procedure Act. Some question might be raised as to the advisability of transferring the proceedings to the District Court rather than back to the agency where no hearing is required by law. This appears to be a procedural requirement somewhat beyond anything contemplated by the Administrative Procedure Act and this Committee believes the matter is one which should be considered further by other Committees of this Section organized specifically to deal with questions involving these particular agencies.

[Editorial note: The Committee recommends that the Section take no action with respect to H. R. 5487 and H. R. 5488.]

S. 14

This bill was introduced by Senator McCarran on January 5, 1949 and represents an attempt to eliminate certain of the overlapping functions of the administrative agencies. The bill is drawn in the form of an amendment to Section 9 of the Administrative Procedure Act and recommends the addition of a new subsection (c) providing in substance that where more than one agency is empowered to act with respect to the same general subject and to a similar purpose and effect, exclusive jurisdiction shall be in the agency which has the more specialized interest or, in the absence thereof, first undertakes to act in any case. Except where agency action is necessary to protect public health and safety or to remove discriminations against interstate and foreign commerce, agency action is prohibited where a state has undertaken active regulation or where the courts have jurisdiction to render equivalent relief. Agency action in the form of public proceedings is prohibited where the parties respondent default or waive them and, with certain exceptions, repetitious hearings and decision procedures are outlawed.

This bill was apparently introduced in an effort to focus attention on the overlapping jurisdiction of many of the agencies. For example, the Federal Trade Commission, the Food and Drug Administration and the Post Office regulation of Foods and Drugs; and the responsibility for the enforcement of the Anti-Trust laws now centered in both the FTC and the Justice Department. It appears that Senator McCarran also desired

to call attention again to the continuous extension of Federal Administrative Control into areas which have traditionally been in the domain of the states.

As written S. 14 appears to be too comprehensive in its terminology and would not provide the necessary delineation between agencies. Terms such as "the more specialized interest in the subject" would undoubtedly promote extensive litigation. The Committee recognizes that a substantial problem is dealt with by this legislation but feels that the answer may well lie in appropriate amendments to the basic statutes after careful analysis and study has been made. To a certain extent the report of the Hoover Commission deals with this subject and has, at the very least, provided a background for further study of it.

[Editorial note: The Committee recommends that the Section not approve S. 14 in its present form, but that a special committee be established to study the problem raised by this bill.]

S. 3455

S. 3455, to revise the laws relating to immigration, naturalization and nationality, was introduced in the Senate on April 20, 1950, by Senator McCarran. On page 93 of that bill, beginning at line 18, and continuing to line 22, there is a provision which would exempt proceedings relating to deportation of aliens from the requirements of the Administrative Procedure Act.

The effect of this would be the same as in that of H. R. 10, heretofore noted, which was opposed by the Administrative Law Section by letter submitted to the Chairman of the House Committee on Judiciary on May 26, 1949 by the then chairman of the National Committee. Senator McCarran, Chairman of the Senate Committee on the Judiciary, has been advised of the opposition of The American Bar Association to this particular provision of that bill, and has assured the Chairman of the National Committee of an opportunity to appear before his committee when hearings are held on the bill.

[Editorial note: The Committee recommends that Section opposition to exemption of deportation of aliens from the requirements of the Administrative Procedure Act be reaffirmed.]

Administrative Rules and Rule-Making

The Committee on Administrative Rules and Rule-Making has given consideration to the following subjects:

1. The new Code of Federal Regulations.
2. The use by Federal Agencies of their authority to dispense with the procedures specified in §4 of the Administrative Procedure Act.
3. Judicial Review of Federal rent decontrol orders.
4. The operation of the statutory procedure in the formulation of food standards.

[Editorial note: An article by Professor Maurice H. Merrill, entitled *Judicial Review of Federal Rent De-control Orders Under Recent Housing and Rent Legislation,* appears elsewhere in this issue of the Bulletin.]

Administrative Practitioners

H. R. 4446, introduced in the House of Representatives on April 29, 1949, by Representative Walter of Pennsylvania, had for its purpose the protection of the public with respect to practitioners before Administrative Agencies. This bill was re-

ported to the House on June 24, 1949 by its Committee on the Judiciary, and was considered by the House on March 15, 1950, but without being passed. On April 25, 1950, Representative Walter introduced H. R. 8201, a revision of H. R. 4446. This revised bill was favorably reported to the House on June 7, 1950 by the Committee on the Judiciary.

[Editorial note: The Committee recommends that the Section endorse H. R. 8201.]

Administrative Court Proposals

Proposals for the establishment of an Administrative Court have been studied but have not been progressed to the point where a formal report can be made. An informal report will be presented at the Annual Meeting of the Section.

Agriculture, Food and Drugs

Certain resolutions adopted by the Section of Corporation, Banking and Business Law, were referred to the Section of Administrative Law for its views. Those proproposals were considered by the Committee on Agriculture, Food and Drugs, and, in turn, by the National Committee. So far as it was deemed necessary, these subjects were considered by the House of Delegates. Finally, the President of The American Bar Association authorized the Chairman of the Division of Food and Drugs, Section of Corporation, Banking and Business Law, to appear before the appropriate Congressional Committees with respect to the legislative proposals involved. Under the circumstances, therefore, these proposals are not here reviewed, and no action is required by the Section of Administrative Law.

Federal Trade Commission's Rules of Practice

The Committee on Advertising, Trade and Securities Regulation gave extended consideration to the subject of limiting attorneys arguing cases before the Federal Trade Commission to subjects covered in Exceptions to the Trial Examiner's Report. The Federal Trade Commission, by amendments of its Rules of Practice published on April 19, 1950, limited the arguments before the Commission to those included in the appeal brief and provided that no further brief could be filed except by special leave. The amendment of the Commission's Rules of Practice met with the approval of the Committee on Advertising, Trade and Securities Regulation, so that no further action on that subject is required.

[Editorial note: The report of the National Committee is signed by its Chairman, Clarence A. Miller. The various recommendations of the Committee and other parts of the report will form the basis of discussions at the annual meeting of the Section.]

REPORT OF THE COMMITTEE ON STATE ADMINISTRATIVE LAW

[Editorial note: Dean Charles B. Nutting, of the University of Pittsburgh Law School, has submitted the following report of the Committee on State Administrative Law. This report is reproduced in full herein because it is believed that it contains an excellent statement of the long-range objectives of the Section in this field.]

The Committee on State Administrative Law considers that its principal functions involve the collection and dissemination of

information regarding activity having to do with the procedural regulation of state and local administrative agencies, the promotion of studies of various administrative law problems at the state and local level and the general encouragement of activity in the field. During the past year it has, through collective action and through the individual efforts of some of its members, made considerable progress in carrying out the purposes for which it was organized.

In September, 1949, the Committee instituted an inquiry as to recent developments in state legislation involving the general control of administrative procedure. The results of this inquiry together with a statement of certain conclusions which seemed to result from the investigation were submitted for publication in the Bulletin of the Section. Although publication was unavoidably delayed, the study should have appeared by the time that this report is submitted to the section. See Vol. 2, No. 4 of the Bulletin. We believe that the investigation was worth while not only as showing the type of activity now in progress but also as pointing out typical difficulties which seem to lie in the way of securing the enactment of suitable laws.

During the year the chairman carried on correspondence with a number of persons who desired information as to various matters falling within the area of the committee's interest and, in some instances at least, was able to make suggestions which were considered helpful by those making the inquiries.

In several cases, members of the committee actively participated in projects involving state administrative law and, through their membership in the committee, were able to render effective service. Of particular interest was the work of Professor [David Meade] Feild, the Georgia member of our committee, who was instrumental in organizing a luncheon meeting held in connection with the meeting of the Georgia Bar Association. This gathering was addressed by Ashley Sellers, Esquire, the Chairman of the Section, and aroused considerable interest in the subject of state administrative law. It is hoped that the stimulus afforded by this meeting will result in intensified activity throughout the state.

In Arizona, a committee of the state bar under the leadership of Charles H. Woods, Esquire, a member of our committee, has engaged in an intensive study of the 56 most important administrative agencies in that state. As a result of its work the State Bar of Arizona adopted a resolution urging the appointment of a legislative committee to prepare a bill governing the rule making and adjudicative procedure of these agencies. Mr. Woods and his committee expect to promote forums, discussions and conferences dealing with the subject and it is hoped that our committee will be able to assist in carrying out the program.

Robert H. Hopkins, Esquire, the member of our committee from Massachusetts, has been working with a committee of the Boston Bar Association which is examining the situation in that state. Our committee was able to be of some assistance to Mr. Hopkins in connection with the work of his group. Similarly, William B. Jones, Esquire, the District of Columbia representative, has been engaged as chairman of a committee of the local association in preliminary work involving the preparation of an administrative procedure act for the District of Columbia.

In several other instances individual members of the committee have been of assistance to local groups in supplying information and suggestions regarding proposed legislation.

As the work of the committee becomes better known more opportunities to be of service will doubtless arise. A coordinating agency is badly needed in the field and the committee, through its contact with numerous state and local groups, is probably in the best position to supply the need.

The collection of information regarding state administrative law, which as previously stated is one of the committee's functions, should be continued. In this connection, consideration should be given to the possible publication of a handbook containing some of the documents which are of basic importance to those working in the field. Much of the material which should be accessible to persons interested in drafting legislation is very difficult to find and the publication of such a handbook would go far toward remedying this deficiency. [Editorial note: The Section had planned to publish such a handbook as that referred to by Dean Nutting during this year, but unavoidable difficulties have delayed preparation of the work.]

To the extent possible the committee should encourage careful study and sound draftsmanship in the preparation of state legislation. This is an area in which the temptation to adopt an unduly emotional approach is very strong. It is also a field in which statemanship of the highest order is needed. If the committee is able to aid in maintaining a high standard of performance on the part of those actively engaged in improving the procedure of administrative agencies it will have made a significant contribution to the cause of better government.

JUDICIAL REVIEW OF RENT DECONTROL ORDERS UNDER RECENT HOUSING AND RENT LEGISLATION

By
Maurice H. Merrill
Professor, University of Oklahoma

[Editorial note: The following article by Professor Merrill was prepared prior to the passage of P. L. 574, 81st Cong., 2d. Sess., June 23, 1950, extending the Housing and Rent Control Act of 1947, as amended, 50 U. S. C. App. 1881 *et seq.*, and amending certain of its provisions.]

I. The Statutory System

As it stands at present (June, 1950), the statute, 50 U. S. C. (Appendix) §1894 (f), provides for Local Advisory Boards which may make recommendations to the Housing Expediter concerning either the decontrol, in whole or in part, of the areas over which the respective boards have jurisdiction, or for adjustments, other than individual, in maximum rents in the area or parts thereof and "with respect to any class of housing accommodations". Standards are set up to guide the boards in their recommendations. Proceedings may be initiated on "petition by a representative group of tenants or landlords". Refusal to hear a petition on the ground that it is "not substantial in character," after a denial, on the same grounds, of a hearing by the Housing Expediter, may be reviewed, as to the sufficiency of the complaint, on petition to the Emergency Court of Appeals.

If a local board, after hearing, certifies a recommendation to the Housing Expediter, that official is to acknowledge, to the board, the date of receipt, and within thirty days is either to approve or to disapprove it, unless he notifies the board, with a statement of reasons, that final action cannot be taken within that time. "Any recommendation of a local board appropriately substantiated and in accordance with applicable law and regulations shall be approved. . . ." This seems a mandatory requirement. The statute then names five conditions, in the presence of which a recommendation "shall be deemed to be appropriately substantiated and in accordance with applicable law and regulations." These are: (A) A public hearing, at which interested persons, including the state and its political subdivisions, were given "reasonable opportunity to be heard, by pleadings or otherwise with right to be represented by counsel"; (B) Notice of the hearing, in writing to the Governor of the State, and by publication in accordance with specifications; (C) Filing the recommendation with the Governor, within five days after forwarding to the Housing Expediter; (D) Preservation of a record of the evidence at the hearing, transmittal to the Expediter of a certified transcript of the record (or those parts on which the recommendation is based) "and a written statement of its findings made upon the basis of such record"; and (E) Support of the local board's findings and recommendations by "adequate and substantial evidence" in the record.

Review of the recommendation and of the action of the Housing Expediter thereon, or of the decision of the Housing Expediter, if he holds the hearing because of the local board's failure to act or because he acts on his own initiative, may be had in the Emergency Court of Appeals on complaint of any "representative group of interested parties" or, where the Expediter is acting on a board recommendation, of the "local board". A summary of the detailed, but simple, provisions for perfecting the review proceedings is unnecessary. The material on review consists of the board recommendation or the expediter's decision "together with the record and statement of findings of the local board or of the Housing Expediter and such statement as the Housing Expediter may desire to make as to his views on the matter", which statement "may be accompanied by such supporting information as the Housing Expediter deems appropriate". The due process problem raised by such an addition to the record apparently is solved by the direction as to the disposition of the proceeding by the court: "If the court determines that the recommendation or decision is not in accordance with law, or that the evidence in the record before the court, *including such additional evidence as may be adduced before the court*,[1] is not of sufficient weight to justify such recommendation or decision, the court shall enter an order disapproving such recommendation or decision; otherwise it shall enter an order approving such recommendation or decision". The decision is to be made within sixty days after receipt of the recommendation or decision by the court, except in exceptional cases, when thirty days more may be taken for disposition of the matter. "The judgment and decree of the court shall be final".

It may be of interest to note that, prior to the 1949 amendments of the act, Emergency Court of Appeals review was automatic in every instance of disapproval of

[1] Emphasis supplied.

a local board recommendation by the Housing Expediter.[2] Most of the decisions discussed hereafter were rendered in cases that arose under that procedure. However, this difference has no bearing on the general features of the review.

II. Actions Reviewable

As we have said, the statute authorizes review of a refusal by the Housing Expediter to hear a petition for relief which a local board has failed to hear, on the ground that the petition "is not substantial in character." [3] Also review may be had concerning a recommendation of a local board, after approval or disapproval thereof by the Housing Expediter, or of a decision by the Housing Expediter, on failure of a local board to hear a petition, or on his own initiative, relative to a general adjustment or to the "removal of maximum rents for any class of housing accommodations" other than "for luxury housing accommodations".

The problem whether a purely negative recommendation by a local advisory board, approved by the Housing Expediter, counseling that no change whatever be made, in response to a petition for a general rent increase, could be revised arose in *Watkins* v. *Woods*.[4] The court upheld the affirmative, pointing out the broad language of the statute contemplating the action of the Housing Expediter upon all recommendations by local boards and action by the court thereafter on proper petition.

III. Record on Review

As has already been noted, the statute provides for review on the record of the hearing before the local board or the Housing Expediter. The Emergency Court of Appeals has insisted that this requires a full transcript of the evidence before the local board and a written statement of the board's findings. Where neither of these accompanied the recommendation made to the Housing Expediter, the Emergency Court sustained the Expediter's motion for a summary disapproval of the recommendation, on the automatic review provided by the original statute.[5] In one case[6] the court granted leave to rebut the Housing Expediter's statements by affidavits.

IV. Who May Be Heard

As has been noted, the review proceedings may be initiated by a "representative group of interested parties" or by the local board affected. The statute explicitly provides that "The Housing Expediter, the local board, representative groups of interested parties, and representatives of the State or States involved, shall be granted, to the extent determined by the court, an opportunity to be heard, by pleadings or otherwise, with right to be represented by counsel".

The court has been quite liberal in its exercise of this authority. The term "representative groups of interested parties" no doubt may be construed to describe labor

[2] See Mermin, An Analysis of Federal Rent-Control Enforcement Litigation, 2 Okla. L. Rev. 413, 240, n. 32 (1949).

[3] 50 U. S. C. Appendix § 1894 (e) (1).

[4] 177 F. (2d) 516 (Em. A. 1949).

[5] In re Recommendation of Norfolk Local Advisory Board, 169 F. (2d) 277 (Em. A. 1948).

[6] In re Recommendation of Local Advisory Board for Miami, 172 F. (2d) 726 (Em. A. 1949).

unions[7], and associations of tenants[8] or of landlords[9]. Judicial grace, rather than statutory right, seems the appropriate foundation for appearances by such a "disinterested" body as the Independent Voters of Illinois[10], and by individuals such as the commanding officer of military units stationed in the area[11] or the dissenting member of a local advisory board[12].

V. Questions Reviewed: Organization and Procedure of Local Boards.

The Court has held that, in view of the statutory language confining its functions to determining whether the recommendation or decision under review is "in accordance with law" or is justified by evidence "of sufficient weight", it has no authority to review the propriety of the Housing Expediter's selection of members of the local board[13].

A number of cases involve voting procedures. That a local board reaches its decision by secret ballot is not an invalidating defect, the Housing Expediter not having exercised his rule-making authority to prescribe open balloting[14]. However, both the act and the Housing Expediter's instructions have been held clearly to contemplate that ballots must be cast at a formal session[15]. In one case, the local board consisted of eleven members. Eight were present at a meeting of which due notification was given. A motion to recommend decontrol carried by four votes to three, the chairman refraining on the ground that his vote was unnecessary. The court upheld the Housing Expediter's disapproval of the recommendation on the ground that the statute should be interpreted as requiring that recommendations receive at least a majority of a quorum present at the meeting[16]. However, a suggestion that much might be said for requiring a majority vote of the whole board was repudiated when the point came up for decision[17].

The Housing Expediter has been upheld in utilizing the power granted, "to issue such regulations and orders, consistent with the provisions of this title, as he may deem necessary to carry out the provisions" of the act[18], and to exercise a substantial con-

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[7] In re Recommendation of the Local Advisory Board for Oklahoma County, 170 F. (2d) 556 (Em. A. 1948); Watkins v. Woods, 177 F. (2d) 516 (Em. A. 1949).

[8] In re Recommendation of Local Advisory Board for Miami, 172 F. (2d) 726 (Em. A. 1949).

[9] In re Recommendation of the Local Advisory Board for Oklahoma County, 170 F. (2d) 556 (Em. A. 1948); In re Recommendation of Local Advisory Board for Miami, 172 F. (2d) 726 (Em. A. 1949).

[10] Watkins v. Woods, 180 F. (2d) 359 (Em. A. 1950).

[11] In re Recommendation of Local Advisory Board of San Antonio, 169 F. (2d) 955 (Em. A. 1948).

[12] In re Recommendation of Local Advisory Board for Miami, 172 F. (2d) 726 (Em. A. 1949).

[13] In re Recommendation of the Local Advisory Board for Oklahoma County, 170 F. (2d) 556 (Em. A. 1948)

[14] In re Recommendation of Local Advisory Board for Miami Defense Rental Area, 172 F. (2d) 726 (Em. A. 1949).

[15] In re Recommendation of Local Advisory Board for Miami Defense Rental Area, 172 F. (2d) 726 (Em. A. 1949).

[16] In re Recommendation of Local Advisory Board of San Antonio, 169 F. (2d) 955 (Em. A. 1948).

[17] In re Recommendation of Local Advisory Board for Miami Defense Rental Area, 172 F. (2d) 726 (Em. A. 1949).

[18] 50 U. S. C. Appendix, § 1894 (2d).

trol over the evidence which may be considered by local boards, particularly with respect to sampling surveys of rental accommodations[19]. In one instance this was pushed so far as to impose such conditions upon the survey as were practically impossible of achievement[20]. In so far as this decision enabled the Housing Expediter's rule to defeat reliance by the local board upon evidence which appears reasonably reliable, it seems to controvert the directions of the act that the board's recommendation be upheld if supported by "adequate and substantial evidence". If the evidence in fact was adequate and substantial, it could not be rejected simply because it failed to meet the requirement of the Housing Expediter's regulation, since that regulation itself was valid only if "consistent with the provisions of this title."

VI. Questions Reviewed: Adequacy of Findings

In one of the earliest cases arising under the act, the Emergency Court of Appeals pointed out that the findings of a local board in support of a recommendation for decontrol should be more than mere repetition of the language of the act setting up the ultimate circumstances under which controls should be removed. The court insisted that there should be specific enumeration of the subsidiary facts which would show in what way the statutory standard for decontrol had been achieved[21]. Apparently, in subsequent cases, the requirements specified have been attained, as in no other instance has the local board's recommendation failed because of insufficiently specific findings.

VII. Questions Reviewed: Sufficiency of Evidence

The statutory direction is to sustain the local board's recommendation if the evidence in the record in support thereof is of sufficient weight to justify it, or if, as elsewhere expressed, it is adequate and substantial to support the findings and recommendation. In a number of instances the court has sustained the sufficiency of the evidence to support the recommendation[22]. In one case, the evidence was found not to support the board's finding that the income of landlords in the area was adequate[23].

VIII. Revisal of Recommendations

In the *Oklahoma County Case*, the local board had recommended a general rent increase of 35%. The Housing Expediter had sustained the recommendation to the extent of 15% only. The Emergency Court of Appeals found that the evidence would sustain an increase of 20% and entered an order approving the recommendation to that extent[24]. A criticism[25] of this result on the ground that the court's action transcends

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[19] In re Jamestown Defense Rental Area, 171 F. (2d) 708 (Em. A. 1948).

[20] Watkins v. Woods, 180 F. (2d) 359 (Em. A. 1950).

[21] In re Recommendation of Local Advisory Board of San Antonio, 169 F. (2d) 955 (Em. A. 1948).

[22] In re Jamestown Defense Rental Area, 171 F. (2d) 708 (Em. A. 1948). In re Recommendation of Local Advisory Board for Miami Defense Area, 172 F. (2d) 726 (Em. A. 1949).

[23] Watkins v. Woods, 177 F. (2d) 516 (Em. A. 1949).

[24] In re Recommendation of the Local Advisory Board for Oklahoma County, 170 F. (2d) 556 (Em. A. 1948).

[25] See Recent Case, 62 Har. L. Rev. 1067 (1949).

the bounds of the judicial power under the Constitution of the United States seems unjustified. In the first place, the Emergency Court of Appeals, created by Congress with final power of decision over this class of cases, probably could be given administrative discretion. In the second place, even under the most rigidly conceptualistic separation of powers ideology, the order entered could be sustained as an application of the legal standard that the recommendation be sustained if supported by evidence.

Later decisions, however, seem to mark a recession from the *Oklahoma County* practice. In one[26], the court disapproved a recommendation by the local board that no rent increase be granted. It refused, however, to entertain a request that it "order a general increase . . . to the extent of 45% . . ., or in any event an increase in such amount as we may determine is justified by the evidence". After quoting the statutory language governing its functions on review, the court expressed the opinion that "it is clear from this language that this court is authorized only to approve or disapprove the Board's recommendation and that, if we disapprove it, we are not empowered to substitute our judgment for that of the Board or the Expediter as to the appropriate recommendation which should be made." [27] Strangely enough, the court cited the *Oklahoma County Case*[28] as authority for the position taken. At a later stage of the same proceeding, the court denied that, in the event of a disapproval of the recommendation, it could remand the case to either the Board or the Expediter with directions specifying the action which must be taken to conform with the law[29]. This does not coincide with positions taken by other courts in analogous situations.[30]

IX. Review of Legal Questions

In several instances, the court has had occasion to define and to review the application of legal standards set up by the act. It has declined to approve the decontrol of a small segment of the beach resort area of an urbanized community where the evidence made it clear that the housing in that area formed part of the accommodations available for the entire community, in which a housing shortage still existed.[31] On the other hand, it was quite willing to concede the propriety of separate decontrol for purely tourist communities around Miami, Florida, accommodations which were not available for the use of those living or employed in the industrial and commercial sections of Miami.[32] The distinction, of course, is apparent in respect of the statutory standard of the need for continuing maximum rents, because "the demand for rental hous-

[26] Watkins v. Woods, 177 F. (2d) 516 (Em. A. 1949).

[27] 177 F. (2d) at 518.

[28] In re Recommendation of the Local Advisory Board for Oklahoma County, *supra*, note 24.

[29] Watkins v. Woods, 180 F. (2d) 359, 364 (Em. A. 1950)

[30] Blackledge v. Farmers Indep. Teleph. Co., 105 Neb. 713, 181 N. W. 709 (1921); Public Service Ry. v. Board of Public Utility Commissioners, 96 N. J. L. 54, 114 A. 323 (1921); In re Assessment of Kansas City Southern Ry., 175 Okla. 444, 53 P. (2d) 536 (1936); Ben Avonborough v. Ohio Valley Water Co., 75 Pa. Super. 290 (1921).

[31] In re Recommendation of Norfolk Local Advisory Board, 172 F. (2d) 390 (Em. A. 1949).

[32] In re Recommendation of Local Advisory Board for Miami Defense Rental Area, 172 F. (2d) 726 (Em. A. 1949).

ing accommodations has been otherwise reasonably met." [33] The court pointed out, in respect to this last standard, that the mere fact that rents might rise under decontrol did not mean that the need for rental housing accommodations had not been reasonably met, since some increase in rents might be expected to arise from the general inflation in uncontrolled prices.[34] The court further held a finding that the need had been reasonably met could be based on a showing that accommodations, previously held off the market, would become available.[35]

X. Conclusion

The Emergency Court of Appeals' task has been largely concerned with procedural problems. On the whole, there seems little to criticize in the way its powers have been exercised. It does not seem ever to have confined the administrative authority in too strait a jacket. In only one instance does it seem to have subordinated statutory command to administrative fiat.[36]

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[33] 50 U. S. C. Appendix, § 1894 (e)(1) (A).

[34] In re Recommendation of Local Advisory Board for Miami Defense Rental Area, 172 F. (2d) 726 (Em. A. 1949).

[35] *Ibid.*

[36] Watkins v. Woods, 180 F. (2d) 359 (Em. A. 1950).

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